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IN THE

Supreme Court of The United States

OCTOBER TERM 1984

EX PARTE:
RANDY ELI GROTHE,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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QUESTION PRESENTED

The question presented is whether the news media has any First Amendment right to protect unpublished material from forced disclosure in a criminal trial when it is undisputed that the criminal defendant who seeks to compel disclosure of the unpublished material has not shown (a) that alternative sources of proof, less intrusive upon First Amendment rights, have been explored and exhausted; or (b) that there is any legitimate actual or compelling need for the material; or (c) that the material is actually relevant to the defense.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

Petitioner Randy Eli Grothe ("Grothe"), a working journalist and a photographer for *The Dallas Morning News*, respectfully prays that a writ of certiorari be issued to review the decision of the Texas Court of Criminal Appeals in this case, which became effective with the denial of Grothe's motion for rehearing on April 24, 1985.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals is reported at 687 S.W.2d 736, and is set out below as Appendix A. The original order in contempt of the

County Criminal Court No. 10 for Dallas County, Texas is unreported, but is set forth in Appendix B.

JURISDICTION

The initial decision of the Texas Court of Criminal Appeals was entered on July 3, 1984. (Appendix A) Grothe's timely motion for rehearing was denied on April 24, 1985. The order denying Grothe's motion for rehearing is set forth in Appendix C. The opinion concurring in the denial of Grothe's motion for rehearing written by the Honorable Sam Houston Clinton of the Texas Court of Criminal Appeals is set forth in Appendix D.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1966 and Supp. 1985).

CONSTITUTIONAL PROVISIONS INVOLVED

The texts of the First Amendment to the United States Constitution, the Sixth Amendment to the United States Constitution, and Article I, Section 8 of the Texas Constitution are set forth in Appendix E.[1]

STATEMENT OF THE CASE

This case involves the punishment of a photographer for declining to review and to produce unpublished photographs subpoenaed by a defendant during the course of her misdemeanor criminal trial when the defendant had shown no effort to exhaust alternative sources of proof, no legitimate actual or compelling need for the photographs, and no particular relevance of the photographs to her defense. The facts before the court below and the proceedings below may be summarized as follows:

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[1] While Grothe asserted his qualified privilege under Article I, Section 8 of the Texas Constitution as well as the First Amendment to the United States Constitution, the Texas Court of Criminal Appeals based its analysis on only the First Amendment.

On September 23, 1983, Mavis Belisle ("Belisle") and others staged an anti-nuclear demonstration outside the offices of Dallas Power & Light Company in downtown Dallas. *The Dallas Morning News*, a general circulation newspaper owned and operated by A. H. Belo Corporation, assigned Grothe to take photographs of the anti-nuclear demonstration. The demonstration resulted in the arrest of Belisle and several other demonstrators. On September 24, 1983, *The Dallas Morning News* published one of the photographs taken of the demonstration by Grothe. Neither *The Dallas Morning News* nor Grothe nor any other newspaper or individual has published or circulated any of the other photographs which Grothe took of the demonstration.

Belisle was subsequently charged by information with the misdemeanor offense of obstruction of a public passageway under Tex. Penal Code art. 42.03 (Vernon 1974) by chaining herself to a doorway during the demonstration. On the eve of her trial in county criminal court, Belisle subpoenaed Grothe.[2]

Before the non-jury trial began on April 11, 1984, Grothe filed a motion to quash Belisle's subpoena. (Appendix F)[3] The County Criminal Court No. 10 of Dallas County, Texas, the Honorable Robert Moss, presiding, held a hearing on Grothe's motion to quash. During this

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[2] Belisle also subpoenaed Susan Rogers, a reporter for *The Dallas Morning News*, who had written the article about the demonstration published in *The Dallas Morning News* on September 24, 1983. Rogers was released from her subpoena by the court after she filed an affidavit stating that she had not witnessed the demonstration. Grothe and Rogers were the *only* individuals subpoenaed by Belisle.

[3] In his motion to quash, Grothe specifically invoked the protection of the First Amendment to the United States Constitution as well as the common law and Article I, Section 8 of the Texas Constitution. See note 1, *supra*. Appendix F contains Grothe's motion and brief to quash and those other portions of the record in both the county criminal court and the Texas Court of Criminal Appeals in which Grothe raised the federal questions sought to be reviewed. See S.Ct. Rule 21.1(h).

hearing, Belisle's counsel initially stated that he did not want to see Grothe's unpublished photographs.[4] Based, in part, upon Belisle's express representation that she wanted only eyewitness testimony from Grothe and would not ask for his unpublished photographs, the county court then ordered Grothe to testify, but only as an eyewitness. Statement of Facts (hereinafter "S.F.") at 30, 85

Grothe objected to testifying as an eyewitness on federal constitutional grounds, but obeyed the court. He appeared and answered every question asked about his personal observations. (S.F. 91-109) However, Belisle then reneged on her initial representation that she did not want to see the unpublished photographs and demanded that Grothe be ordered to leave the courtroom and go to *The Dallas Morning News*' offices and review his unpublished photographs and produce them so that Belisle could cross-examine him about them. (S.F. 109)[5]

During the evidentiary hearing on Grothe's motion to quash, Belisle's counsel expressly admitted that the full nature and extent of his investigative effort was an ill-conceived plan to attempt to appropriate the media as his investigative arm. He admitted: "Other than going to the [Dallas] Morning News I did not make any further investigation." (S.F. 32) It was undisputed that alternative sources of evidence in fact existed. However, Belisle failed to conduct an investigation to find any of the many witnesses present at the scene of the alleged offense. (S.F. 32) Belisle knowingly failed to interview the investigating police officer. (S.F. 4) She knowingly failed to interview the Dallas Power and Light Company security guard who was present. (S.F. 4) Although Belisle expressly admitted

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[4] Belisle's attorney told the county court: "We just want his testimony. His testimony will be as good as the pictures." Statement of Facts (hereinafter "S.F.") at 85.

[5] Grothe had not reviewed the unpublished photographs since they were taken on September 23, 1983. (S.F. 108) Belisle's trial was held on April 11-12, 1984.

that she had access to the testimony of th many other demonstrators who participated with her, she called only one fellow demonstrator as a witness. (S.F. 8, 43) Others, such as passers-by, also took pictures. (S.F. 71) Finally, there were hundreds, if not thousands, of witnesses to the demonstration, none of whom Belisle attempted to locate. (S.F. 8)

Moreover, during the hearing on Grothe's motion to quash, Belisle showed no compelling need for the unpublished photographs. Her counsel expressly admitted that he would not represent to the court that Grothe's testimony was indispensably necessary or went to the heart of the case. (S.F. 7) He expressly admitted he could offer only a "hunch." (S.F. 7) This hunch was based only upon counsel's uninformed and unsupported *inference* of a need for the evidence. (S.F. 9-10)

When offered an opportunity to tell the court why there was an actual need for the unpublished photographs, Belisle expressly refused to do so. Belisle objected to specifying the "points in contention" in order to demonstrate any need for the unpublished photographs, and the court sustained her objection, finding that this highly relevant constitutional consideration was irrelevant. (S.F. 44)

Despite Belisle's failure to show both any exhaustion of the abundant alternative sources of information and any compelling need for Grothe's unpublished photographs, the county court overruled Grothe's constitutional objections to producing the unpublished photographs. The court ordered Grothe to go to the offices of *The Dallas Morning News* and review, return with, produce, and reveal the unpublished photographs. (S.F. 129) The court did not require Belisle to prove that the unknown contents of the unpublished photographs were highly relevant. The court expressly recognized that it was mere speculation as to whether the unpublished photographs would or would not refresh Grothe's recollection as to any material issue before the court. (S.F. 131) Nevertheless,

the court ordered Grothe to obtain the unpublished photographs and reveal them. (S.F. 129)

Upon Grothe's return to the courtroom after conferring with his superiors at *The Dallas Morning News*, he respectfully declined to produce the unpublished photographs. (S.F. 131) The court pronounced the contempt sentence (S.F. 132-133), recessed the criminal proceedings against Belisle, and released Grothe on $1,000.00 surety bond pending the filing of an application for a writ of habeas corpus with the Texas Court of Criminal Appeals within three days of April 12, 1984, the date on which the contempt order was entered.

On April 13, 1984, Grothe timely filed his motion for leave to file his original application for writ of habeas corpus in the Texas Court of Criminal Appeals pursuant to Tex. Const. art. V, § 5 and Tex. Crim. Proc. Code Ann. arts. 4.04 and 11.05 (Vernon 1977 and Supp. 1983). (Appendix F at 12-15) On the same day, April 13, 1984, the Texas Court of Criminal Appeals ordered Grothe's commitment stayed and Grothe's bond continued until further order of the court. (Appendix G) On April 16, 1984, the Texas Court of Criminal Appeals ordered the county court judge to file a response and to forward the record to the court, granted Grothe leave to file a supplemental brief, and invited briefs from the District Attorney and Belisle to be filed on or before April 27, 1984. (Appendix H) On April 27, 1984, the Texas Court of Criminal Appeals granted Grothe's motion for leave to file his original application for writ of habeas corpus and ordered that the case be submitted to the court en banc on May 30, 1984 without oral argument. (Appendix I)

On July 3, 1984, the Texas Court of Criminal Appeals issued its opinion denying Grothe's application for a writ of habeas corpus. (Appendix A) Grothe filed a timely motion for rehearing on July 18, 1984. The court took Grothe's motion for rehearing under advisement for nine months and, on April 24, 1985, denied Grothe's motion for

rehearing. (Appendix C) Justice Clinton of the Texas Court of Criminal Appeals issued an opinion concurring in the denial of Grothe's motion for rehearing. (Appendix D)

On May 9, 1985, County Criminal Court No. 10 for Dallas County, Texas continued Grothe's bond in effect pending the filing and disposition of this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I.

The Court Below Has Decided An Important Question of Federal Law Which Should Be Settled By This Court.

This case squarely presents important and recurring federal constitutional issues. The increasingly indiscriminate and unthinking service of subpoenas upon the news media is well illustrated by this case.

The last time the full Court took the opportunity to write on questions similar to the one presented by this case was thirteen years ago in *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Branzburg*, this Court recognized that news gathering "qualifies" for First Amendment protection and that "without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. at 681. *Cf. In re Roche*, 448 U.S. 1312 (Brennan, Circuit Justice, 1980) (granting application for stay of order compelling non-party reporter to disclose identity of confidential source).

Although the Court in *Branzburg* held that the reporters had an obligation to respond to grand jury subpoenas, Justice Powell wrote separately "to emphasize ... the limited nature of the Court's holding." 408 U.S. at 709.

> The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or

> in safeguarding their sources. Certainly, we do not hold, as suggested in MR. JUSTICE STEWART'S dissenting opinion, that state and federal authorities are free to "annex" the news media as "an investigative arm of government." ...
>
> ... The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.
>
> In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

Id. at 709-10.

This case squarely presents circumstances where legitimate First Amendment interests require protection. The Texas Court of Criminal Appeals' opinion of July 3, 1984 is deeply disturbing. (Appendix A) Real damage, in specific terms, has been done to First Amendment values which exist to protect the working press for the public's benefit. The opinion of July 3, 1984 is an ominous and truly extraordinary holding which places the Texas court in the extreme and unprecedented position of refusing to balance and accommodate the competing concerns reflected in the First and Sixth Amendments.

Although the court below purported to consider and to decide the "very narrow question . . . [of] whether the First Amendment to the United States Constitution or Art. I, Sec. 8 of the Texas Constitution create a privilege whereby photo journalists are excused from testifying and fro n producing photographs of alleged criminal activity witnessed in a public place," *Ex parte Grothe*, 687 S.W.2d

at 737; Appendix A at 1,[6] the court's reasoning was not narrow but boundless. This is not a case where defendant Belisle was denied the right to confront and cross-examine her accusers. *See Washington v. Texas*, 388 U.S. 14 (1967). Nor is this a case in which a journalist who was also an eyewitness to an alleged crime refused to testify as to his recollection and his personal observations of the event in question. This is a case in which a criminal defendant singled out Grothe and sought to appropriate his unpublished photographs in the absence of any showing of need or exhaustion of alternative sources of information. The only "need" asserted by Belisle was the need to fully cross-examine Grothe as a witness who gave conflicting testimony at trial. This need was created by Belisle herself when she chose to call Grothe as a witness knowing full well that he would refuse to produce the unpublished photographs. This self-created claim of need to cross-examine her own witness is certainly insufficient to override the media's interest in maintaining the integrity of the news gathering and editorial processes. Without this Court's intervention, every civil litigant and criminal defendant may manufacture similar illegitimate "needs" for unpublished material in the possession of journalists.

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[6] The court also attempted to narrow its opinion by acknowledging that the issue of compulsory disclosure of the identities of confidential informants was not squarely presented by the instant facts. Ex parte Grothe, 687 S.W.2d 736, 738-39 (Tex. Crim. App. 1984); Appendix A at 4. However, the court failed to recognize that forced disclosure of previously unpublished photographs and forced revelation of the identities of confidential informants are equally intrusive upon the news-gathering and the editorial processes.

> "The compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants." Altemose Construction Co. v. Building & Construction Trades Council, 443 F. Supp. 489 (E.D. Pa. 1977)
>
> "Whether or not the source or information is confidential, inquiry into unpublished information necessarily intrudes upon editorial decisions and can seriously impair the gathering and publication of news." Florida v. Morel, 4 Media L. Rep. 2309 (Fla. Cir. Ct. 1979)

The constitutional protection of news gathering is grounded on the public's right to know of newsworthy events and on the press' historic function in an open, democratic society: the protection of news gathering furthers "the role of investigative journalism as a 'watchdog' over all branches of government" and thus effectuates the "checking value" of the First Amendment. *Johnson v. City of Miami*, 6 Media L. Rep. 2110 (S.D.Fla. 1980); *see New York Times Co. v. United States*, 403 U.S. 713, 717 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 717-21 (1931); *Democratic National Committee v. McCord*, 356 F. Supp 1394, 1397 (D.D.C. 1973); A.M. Bickel, *The Morality of Consent* at 85 (Yale Univ. Press 1975); Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B.F. Res. J. 521.

The disruptive and chilling effect that Grothe's contempt citation has had and will continue to have is not hypothetical or speculative. The court's implicit ruling that Belisle's non-existent attempts to obtain her evidence from alternative sources and her wholly self-created "need" for this supposed evidence from the media can overcome the constitutional privileges which protect unpublished material places every journalist at the beck and call of every criminal defendant, every prosecutor, and every civil litigant who *thinks* (not knows) that the journalist *may* (not does) have information that may in some way pertain to that litigant's cause. Journalists will be annexed as regular witnesses and will be required repeatedly to attend pretrial depositions and trials rather than reporting and publishing news about newsworthy events and public controversies. Stripped of effective constitutional protection, reporters and editors will be forced to fail to report upon controversial events and crimes that may some day be involved in court proceedings. In order to do its job well, the press simply cannot afford to become constantly embroiled in litigation.

The impact of Belisle's subpoena on *The Dallas Morning News*' editorial process is immediately apparent. If *The Dallas Morning News* had never published any photograph of the demonstration in which Belisle participated, Belisle never would have thought to subpoena

Grothe. In light of the court's opinion, *The Dallas Morning News*' future editorial decisions will be based primarily on the litigious nature of the subjects of articles or photographs rather than on the newsworthiness of the articles or photographs.

Grothe was in the business of gathering and disseminating news. The county court's contempt citation and the judicially compelled disclosure of Grothe's unpublished photographs has a serious, adverse impact on the ability of the press to gather news. The *in terrorem* effect which judicially compelled disclosure necessarily has on Grothe, other journalists, and their sources intolerably constricts the flow of vital information to the public. *Mize v. McGraw-Hill, Inc.*, 86 F.R.D. 1, 2 (S.D. Tex. 1980); *Democratic National Committee v. McCord*, 356 F. Supp. at 1397. The cumulative effect of subpoenas to the press, indiscriminately issued as in this case, provides a genuine and serious interruption of, and interference with, the business of the working press. It is constitutionally impermissible for litigants to be allowed simply to "annex" the news media as if it were their own "investigative arm." *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting); *Id.* at 709 (Powell, J., concurring).

Under the Texas court's reasoning, any party to a criminal case may freely, and with impunity, force the news media to serve as his own investigative arm. Under the Texas court's holding, constitutional protection of the news gathering process no longer exists for any practical purpose. This case represents an extreme and extraordinary example of a planned effort to appropriate unpublished material without even an effort to comply with the constitutionally mandated pre-conditions. If Belisle succeeds under the facts in this case, the news media will be vulnerable to repeated and increasingly indiscriminate intrusions into unpublished materials. The constitutional protections which are at stake in this case serve more than the individuals who work for the media. These constitutional protections exist because of the public's overriding interest in the freedom of the press. Given the importance of the public issues involved in this case, this Court should grant Grothe's petition.

II

The Court Below Has Decided An Important Federal Question In A Way Which Conflicts With The Decisions of Federal and State Courts.

Near the outset of its opinion, the Texas Court of Criminal Appeals placed an altogether new gloss on this Court's set of opinions in *Branzburg v. Hayes*, *supra*, when it refused to recognize *any* balancing of Grothe's First Amendment rights against Belisle's asserted Sixth Amendment rights. *Grothe*, 687 S.W.2d at 738; Appendix A at 3. In so doing, the Texas court departed radically from the construction which all other courts have placed on *Branzburg*.

Subsequent to *Branzburg*, all of the courts that have confronted the issue have recognized the constitutional dimensions of a journalist's qualified privilege to decline to reveal both unpublished information and the identities of confidential sources. The balancing test recognized by all other courts consists of three prongs and the burden of proof rests with the party seeking disclosure of the privileged material. The three prongs which the moving party must meet are that the privileged material (1) is highly material and relevant, (2) is critical to the maintenance of the moving party's claim or goes to the heart of his claim, and (3) is unobtainable from other sources. The first two parts of the balancing test are sometimes collapsed into one part which is termed the moving party's asserted need for the privileged information.[7]

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[7] The following list of cases is illustrative rather than exhaustive.

FEDERAL COURTS

United States Courts of Appeals

District of Columbia Circuit

Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) (non-party reporter not required to disclose confidential sources because no exhaustion of alternative sources).

First Circuit

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980) (vacating district court's order compelling disclosure and recognizing a balancing test even in libel cases).

Second Circuit

United States v. Burke, 700 F.2d 70 (2d Cir.), *cert. denied*, 104 S.Ct. 72 (1983) (quashing criminal defendant's subpoena for reporter's unpublished tapes, transcripts, notes, and other material because defendant could not show requisite need for the unpublished material).

McGraw-Hill, Inc. v. Arizona, 680 F.2d 5 (2d Cir. 1982) (quashing subpoena in civil antitrust litigation because of inadequate showing of need and exhaustion of alternative sources).

Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (quashing subpoena in federal civil rights litigation because of inadequate showing of need).

Third Circuit

United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980), *cert. denied sub nom. Cuthbertson v. CBS, Inc.*, 449 U.S. 1126 (1981), *on remand*, 511 F. Supp. 375 (D.N.J.), *rev'd*, 651 F.2d 189 (3d Cir.), *cert. denied*, 454 U.S. 1056 (1981) (journalist's qualified privilege protects unbroadcast television outtakes).

Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) (vacating contempt citation because inadequate showing of exhaustion of alternative sources).

Fifth Circuit

In re Selcraig, 705 F.2d 789 (5th Cir. 1983), *vacating Trautman v. Dallas Independent School District*, 8 Media L. Rep. 1088 (N.D. Tex. 1982) (vacating contempt citation because of inadequate showing of need).

Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir.), *modified on rehearing*, 628 F.2d 932 (1980), *cert. denied*, 450 U.S. 1041 (1981) (recognizing balancing test applies even in libel cases).

Eighth Circuit

United States v. Calvert, 523 F.2d 895, 902 n.4 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976) (quashing criminal defendant's subpoena because of inadequate showing of need).

Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (recognizing balancing test in libel case).

Ninth Circuit

Bursey v. United States, 466 F.2d 1059 (9th Cir.), *reh. denied*, 466 F.2d 1092 (1972) (criminal case).

Tenth Circuit

Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) (recognizing balancing test).

UNITED STATES DISTRICT COURTS

District of Columbia

United States v. Hubbard, 493 F. Supp. 202 (D.D.C. 1979) (criminal defendant made inadequate showing of need and exhaustion).

Democratic National Committee v. McCord, 356 F. Supp. 1394 (D.D.C. 1973) (reporter not required to produce unpublished notes and tapes because subpoenaing party had not exhausted all reasonable alternative sources of the information).

Florida

United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982) (criminal case).

United States v. Gersten, 5 Media L. Rep. 1334 (M.D. Fla. 1979) (criminal case-unbroadcast materials covered by privilege).

Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975) (qualified privilege specifically protects editorial process and unpublished materials).

Illinois

Gulliver's Periodicals, Ltd. v. Charles Levy Construction Co., 455 F. Supp. 1197 (N.D. Ill. 1978) (qualified privilege covers unpublished materials).

Massachusetts

United States v. Collatos, Cr. No. 82-264-G (D. Mass. 1982) (quashing [without opinion] criminal defendant's subpoena for a New York Times reporter's notes, records, and information regarding confidential sources).

Michigan

McArdle v. Hunter, 7 Media L. Rep. 2294 (E.D. Mich. 1981).

New York

United States v. Orsini, 424 F. Supp. 229 (E.D. N.Y. 1976), *aff'd without opinion*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977).

Montezuma Realty Corp. v. Occidental Petroleum Corp., 494 F. Supp. 780 (S.D. N.Y. 1980).

Rosario v. New York Times Co., 84 F.R.D. 626 (S.D. N.Y. 1979) (qualified privilege protects editorial process).

United States v. DePalma, 466 F. Supp. 917 (S.D. N.Y. 1979) (inadequate showing of need).

Pennsylvania

Altemose Construction Co. v. Building & Construction Trades Council, 443 F. Supp. 489 (E.D. Pa. 1977) (qualified privilege protects unpublished materials).

Texas

United States v. Smalley, 9 Media L. Rep. 1252 (N.D. Tex. Dec. 9, 1982 and Jan. 14, 1983) (qualified privilege covers unbroadcast material).

Mize v. McGraw-Hill, Inc., 82 F.R.D. 475 (S.D.Tex. 1979), *on rehearing*, 86 F.R.D. 1 (S.D. Tex. 1980).

Virginia

Gilbert v. Allied Chemical Corp., 411 F. Supp. 505 (E.D. Va. 1976).

TEXAS COURTS

All of the previously reported cases from state courts in Texas have recognized and adhered to the journalist's qualified privilege to decline to produce unpublished materials and to identify confidential sources.

Suede Originals v. Aetna Casualty Co., 8 Media L. Rep. 2565, No. 82-0532-L (Dist. Ct. of Dallas County, 193rd Judicial Dist. of Texas, Nov. 19, 1982). (*See* Appendix F at 4-7).

Dallas Oil and Gas, Inc. v. Mouer, 533 S.W.2d 70 (Tex. Civ. App. — Dallas 1976, no writ).

In re Grand Jury Subpoena, 5 Media L. Rep. 1153, No. 79-CR-2157-D (Dist. Ct. of Nueces County, 105th Judicial Dist. of Texas, May 24, 1979) (state made insufficient showing of need to compel disclosure of previously unbroadcast television footage).

THE COURTS OF OTHER STATES

Courts of many states other than Texas have recognized the existence of the journalist's qualified privilege under the federal constitution, the common law, and their respective state constitutions.[8]

Connecticut

Connecticut Labor Relations Board v. Fagin, 33 Conn. Supp. 204, 370 A.2d 1095 (Conn. Super. Ct. 1976).

Delaware

Delaware v. McBride, 7 Media L. Rep. 1371 (Del. Super. Ct. 1981) (criminal case).

Florida

Florida v. Reid, 8 Media L. Rep. 1249 (Fla. Cir. Ct. 1982) (criminal case).

Florida v. Peterson, 7 Media L. Rep. 1090 (Fla. Cir. Ct. 1981) (criminal case).

Florida v. Silber, 5 Media L. Rep. 1188 (Fla. Cir. Ct. 1979) (criminal case).

Iowa

Lamberto v. Bown, 326 N.W.2d 305 (Iowa 1982).

New Hampshire

New Hampshire v. Siel, 8 Media L. Rep. 1265 (N.H. 1982) (criminal case).

North Carolina

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[8] Again, this list is illustrative, not exhaustive. Other states, including Alaska, Arizona, Arkansas, California, Delaware, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, and Tennessee, have enacted "shield laws" to supplement the qualified constitutional and common law privileges available to journalists.

North Carolina v. Rogers, 9 Media L. Rep. 1254 (N.C. Super. Ct. 1983) (criminal case).

Ohio

In re McAuley, 63 Ohio App.2d 5, 408 N.E.2d 697 (Ohio Ct. App. 1979) (criminal case).

Oklahoma

Taylor v. Miskovsky, 7 Media L. Rep. 2408 (Okla. 1981).

Vermont

State v. St. Peter, 132 Vt. 226, 315 A.2d 254 (1974) (criminal case).

Vermont v. Blais, 6 Media L. Rep. 1537 (Vt. Dist. Ct. 1980) (criminal case).

Virginia

Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974) (criminal case).

Washington

Senear v. The Daily Journal American, 8 Media L. Rep. 1151 (Wash. 1982), *on remand*, 8 Media L. Rep. 2489 (Wash. Super. Ct. 1982).

Wisconsin

Wisconsin ex rel. Green Bay Newspapers v. Circuit Court, 9 Media L. Rep. 1889 (Wis. Sup. Ct. 1983) (criminal case).

Zelenka v. Wisconsin, 83 Wis.2d 601, 266 N.W.2d 279 (1978) (criminal case).

Amato v. Fellner, 4 Media L. Rep. 1552 (Wis. Cir. Ct. 1978).

The absolutist position adopted only by the Texas Court of Criminal Appeals denies the existence of *any* journalist's qualified First Amendment privilege. This holding is based upon a plain misreading of the plurality opinion in *Branzburg*. The Texas court's holding that no qualified privilege exists at all runs directly contrary to thirteen years of precedents from the Supreme Court, *see In re Roche*, *supra*, federal district and circuit courts, courts of other states, and Texas courts. Such a holding is wholly unwarranted under the law, and is especially unwarranted under the facts of this case. Only this Court can resolve the sharp conflict created by the Texas Court of Criminal Appeals' opinion.

Only by misreading *Branzburg* did the court make it possible to ignore the wealth of federal and state authorities that have embraced the balancing test since the *Branzburg* decision. The court simply dismissed all of the pertinent authorities cited by Grothe, noting incorrectly that "most of the cases cited [dealt] with disclosure in civil actions or disclosure of confidential sources [and] as such [were] unpersuasive and not controlling." *Grothe*, 687 S.W.2d at 739; Appendix A at 6.

The court below bolstered its strained and erroneous construction of *Branzburg* with equally strained and erroneous constructions of *Zurcher v. Stanford Daily*, 436 U.S. 578 (1978), *United States v. Nixon*, 418 U.S. 683 (1974), and *Washington v. Texas*, *supra*. The court construed these cases to stand for the proposition that no accommodation of First Amendment interests is *ever* required in the context of a criminal case. The court's view is simply wrong.

The court placed overriding reliance on the theory that Sixth Amendment rights are superior to all other constitutional rights, basing this notion upon *Washington v. Texas*, *supra*. However, in *Washington v. Texas*, this Court expressly recognized that a criminal defendant's Sixth Amendment rights are not absolute. Asserted Sixth Amendment rights are qualified and must be balanced against other constitutional rights. In *Washington v. Texas*, this Court carefully and expressly noted that

"[n]othing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges . . . ." 388 U.S. at 23 n.21.

A criminal defendant's Sixth Amendment right to call a witness yields regularly to constitutional privileges such as the privilege against self-incrimination. *See, e.g., United States v. Trejo-Zambrano*, 582 F.2d 460 (9th Cir.), *cert. denied*, 439 U.S. 1005 (1978) (holding that Sixth Amendment right to compulsory process does not include right to compel witness to waive Fifth Amendment privilege); *Myers v. Frye*, 401 F.2d 18 (7th Cir. 1968) (holding that right to compulsory process does not encompass either right to call witness who will assert Fifth Amendment privilege or right to inspect allegedly exculpatory letters in possession of witness's attorney); *Smith v. United States*, 385 F.2d 34, 38 n.12 (5th Cir. 1967) (holding that criminal defendant was not denied his right to compulsory process because the witness that he called asserted his privilege against self-incrimination); *State v. Taylor*, 395 A.2d 1239, 1240 (N.H. 1978) ("The Supreme Court narrowly construed the compulsory process clause to give a defendant the right to produce witnesses, not to produce their testimony. The witness may still invoke *a constitutional privilege* or have his testimony excluded on evidentiary grounds") (citations omitted and emphasis added); *Hall v. State*, 475 S.W.2d 778 (Tex. Crim. App. 1972) (right to call co-defendant as a witness does not prohibit co-defendant from asserting Fifth Amendment privilege).

Moreover, a criminal defendant's asserted right to be free from news coverage of his trial yields regularly to the public and the press' First Amendment right of access to criminal trials. *See, e.g., Press-Enterprise Co. v. Superior Court of California, Riverside County*, 104 S.Ct. 819 (1984); *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980); *Houston Chronicle Publishing Co. v. Shaver*, 630 S.W.2d 927 (Tex. Crim. App. 1982).

The vast majority of decisions clearly recognize the need to balance the competing constitutional principles

embodied in the Sixth Amendment and the First Amendment. This is accomplished by requiring the criminal defendant to satisfy all three prongs of the test articulated by the courts in the wake of *Branzburg* before requiring a journalist to disclose previously unpublished information.

The Texas court's unique refusal to recognize the constitutional necessity for a balancing test represents the most fundamentally disturbing aspect of the decision. Belisle failed to meet her burden under the balancing test. She made no showing of either exhaustion of alternative sources or compelling need for the photographs. On this record, it is clear that Belisle made absolutely no attempts to obtain photographs of the demonstration from any source other than Grothe and *The Dallas Morning News*. Although she knew other photographers and reporters had witnessed the demonstration, Belisle made no attempt to obtain pictures or film taken by any other journalist. Although the Dallas Power & Light Company security guard who testified at trial admitted that he had taken pictures of the incident, Belisle made no effort to obtain those photographs.

Belisle further failed to show any compelling need for the unpublished photographs. At the outset, Belisle made no proffer that the photographs would contain exculpatory matters relevant to her defense in this action. In order to induce the court to rule as it did, Belisle repeatedly represented to the court that Grothe was being asked to testify only in his capacity as an ordinary citizen who was one of the eyewitnesses to the occurrence (S.F. 30, 34, 45, 85) and that she would not ask the court to require him to produce the unpublished photographs (S.F. 6, 30, 85).

After calling Grothe as her witness with the representation that she did not seek the unpublished photographs, Belisle then sought to exploit Grothe by attempting to appropriate him fully as her investigator. Belisle's alleged need for Grothe's was illegitimate and unfounded.

CONCLUSION

The decision below presents a recurring issue of major public importance which should be decided by this Court; and the decision below conflicts with decisions of federal courts and other state courts.

Petitioner Randy Eli Grothe respectfully prays that a Writ of Certiorari issue to review the decision of the Texas Court of Criminal Appeals entered in this case on July 3, 1984.

Respectfully submitted,

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June 1985

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been forwarded to all counsel of record listed below on this 24th day of June, 1985:

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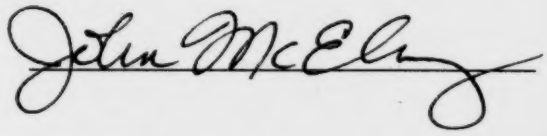

APPENDIX A

OPINION OF THE

TEXAS COURT OF CRIMINAL APPEALS

EX PARTE
RANDY ELI GROTHE
NO. 69,275

Habeas Corpus Application from Dallas County

OPINION

This is an original application for writ of habeas corpus wherein applicant requests that this Court issue a writ of habeas corpus and relieve him from an order of contempt entered by respondent judge during the pendency of a criminal trial. See Art. V, Sec. 5, Tex.Const. and *Ex Parte Sheppard,* 548 S.W.2d 414 (Tex.Cr.App. 1977). This application presents a very narrow question, to wit: whether the First Amendment to the United States Constitution or Art. I, Sec. 8 of the Texas Constitution create a privilege whereby photo journalists are excused from testifying and from producing photographs of alleged criminal activity witnessed in a public place. To this narrow question we answer in the negative and deny relief.

Applicant is and was at all relevant times employed as a photographer for the Dallas Morning News. On the morning of September 23, 1983, applicant was assigned to cover a protest demonstration occurring outside the office of Dallas Power and Light on Commerce Street in downtown Dallas. Applicant proceeded to the above location and took photographs of the demonstration and the subsequent arrest and removal of certain demonstrators, including Mavis Belisle. The following day the Dallas Morning News ran a photograph taken by applicant of Belisle being physically removed from the site by arresting officers.

Subsequently Belisle and two co-defendants were charged by information with violation of V.T.C.A. Penal

Code Sec. 42.03(a)(1), obstructing a public passageway. In so charging Belisle, the State specifically pled that the obstruction of the passageway was accomplished "by chaining himself to the said doorway of a public building."

At trial on the merits Belisle admitted participation in the demonstration but specifically denied she had at any time been chained to the building. The State called the arresting officer and a security guard for Dallas Power and Light, both of whom testified to having personally observed Belisle chained to the doorway. The defense called Belisle and one of the demonstrators (who was allegedly closest to Ms. Belisle), both of whom testified that Belisle was never at any time chained to the doorway. Thus the central issue at trial was whether the defendant was chained to the doorway.

Belisle sought to subpoena applicant to present testimony as to his personal observations of the demonstration and Belisle's activities.

Applicant filed a motion to quash the subpoena alleging, inter alia, that the First Amendment created a privilege for newspaper reporters and that defendant Belisle had failed to make a substantial showing as to what applicant claimed was required by *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). After an extensive hearing the respondent held that applicant would be required to testify as to his personal observations. Prior to testifying, applicant, by his attorney, acknowledged that, as to his personal observations of alleged criminal activity, he was on the same footing as a layperson and therefore he would testify. He nonetheless sought to limit his testimony just to personal observation and continued to invoke a privilege not to answer any questions which encroached upon his status as a reporter. Applicant testified as to his observations. He testified

that he *believed*[1] that defendant Belisle was chained to the doorway; however, he admitted that he had, on a prior occasion, told his attorney that he did not remember whether defendant Belisle was chained. Significantly, he further testified that the photographs he took would probably show whether the defendant was in fact chained and would refresh his recollection. Subsequently, the defense requested that applicant be ordered to review his photographs. Respondent, after further argument by all parties, ordered applicant to review his photos and have the photos available for cross-examination. To this order applicant refused to comply and accordingly was held in contempt by respondent, and ordered jailed until he purged himself. This writ immediately followed.[2]

Applicant argues that the U.S. Constitution requires that courts recognize a qualified privilege for the press not to be required to testify. Applicant urges that by reading Justice Stewart's dissent with Justice Powell's concurrence in *Branzburg*, supra, a balancing test is required before a reporter will be ordered to divulge sources to courts or grand juries. We decline to adopt any combination of the dissenting and concurring opinions. The four justice plurality opinion in which Justice Powell concurred quite clearly found that no balancing was required. *Branzburg*, supra, at pp. 705-06. In a footnote in *Zurcher v. Stanford Daily,* 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978), Justice Powell clarified his position in *Branzburg*, observing that any press interests can be weighed in the regular subpoena process. Justice Powell specifically found no exception to the requirements of a

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[1] All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.

[2] It is this Court's understanding that applicant was immediately released on bail and did not pursuant to this contempt order, actually spend any time jailed.

subpoena for media personnel based upon the First Amendment. *Zurcher*, supra., concurring opinion, footnote 3 at 570.

Assuming arguendo, that the dissent in *Branzburg* did in fact recognize some sort of media privilege based upon the First Amendment, it is abundantly clear that the facts in *Branzburg* are much closer constitutionally than the limited facts in the case sub judice.

Branzburg involved three differing claims of privilege, basically centering on appearing before a grand jury and disclosing confidential sources. One of the reporters in *Branzburg* had, by virtue of a confidential informer relationship, witnessed and photographed the making of hashish. He was required to come forward and divulge "secret" information. We fail to discern any greater interest for applicant here, who allegedly witnessed a crime in a public place. If in fact any weighing of interests is required for requiring the press to divulge confidential informants, that issue is not presented today and we do not decide it.

In *Zurcher v. Stanford Daily,* 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) the Supreme Court held that nothing in the First Amendment exempted the press from being subject to a search for proof of criminal activity. We find the facts in *Zurcher* very similar to the instant case. *Zurcher*, supra, involved the search of a student newspaper office for photographs of a student demonstration wherein several police officers were injured. The State desired to identify possible defendants for criminal charges through the photographs. The Supreme Court upheld the search and stated:

> "We finally note that if the evidence sought by warrant is sufficiently connected to the crime to satisfy the probable cause requirement, it will very likely be

> sufficiently relevant to justify a subpoena and to withstand a motion to quash."[3] *Zurcher,* supra, at 566.

Thus implicitly, the Supreme Court has recognized that the press is not immune from subpoena. Although we find *Zurcher* factually less compelling than the case sub judice, we nevertheless believe that it is persuasive in its analysis of First Amendment privileges.

We are not unmindful of the important place of a free press in our society, see *New York Times v. United States,* 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *Grosjean v. American Press,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936); *Estes v. Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *Houston Chronicle Pub. Co. v. Shaver,* 630 S.W.2d 927 (Tex.Cr.App. 1982). Not to be forgotten, however, is the interest in protecting the integrity of the criminal justice system. See *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

In *Nixon,* supra, the Supreme Court was weighing the asserted right of presidential privilege versus the criminal justice system's need for relevant, material evidence. While the Court did recognize a constitutionally based presidential privilege, the privilege had to give way to the criminal defendant's rights and the integrity of the criminal justice system. The need to develop all facts in an adversarial system of criminal justice is fundamental and comprehensive. *Nixon,* supra.

Additionally, a citizen accused of crime has the right to confront and fully cross-examine all persons who have

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[3] We recognize that the Texas Legislature has adopted a search shield law which provides more protection than the Zurcher court did. Art. 18.01(e), V.A.C.C.P. However, to this date the Legislature had *not* adopted a newspaper testimonial privilege, a reporter's sources shield statute or excluded newspapers from subpoenas.

testimony relevant to criminal charges. See *Davis v. Alaska,* 415 U.S. 311, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). As the Supreme Court noted in *United States v. Nixon*, supra:

> "The right to production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor ... It is the manifest duty of the courts to vindicate those guarantees and to accomplish that, it is essential that all relevant and admissible evidence be produced." *United States v. Nixon,* 418 U.S. at p. 711, 94 S.Ct. at p. 3109.

Applicant cites us to many authorities from other jurisdictions, urging that a balancing test be adopted and applied to the instant case. We note that most of the cases cited deal with disclosure in civil actions or disclosure of confidential sources; as such we find them to be unpersuasive and not controlling. Moreover, we fail to see a hypothetical case wherein a weighing process would result in suppression of highly relevant personal observation of public criminal activity.

In light of the foregoing, we fail to see how applicant's rights will be in any way diminished in requiring production of photographs of an alleged criminal offense occurring in a public place.

The application for writ of habeas corpus is denied. It is so ordered.

CAMPBELL, Judge

Delivered July 3, 1984
En Banc
Teague, Clinton, JJ concur in this opinion.
W.C. Davis, Tom Davis, JJ and
Onion, P.J. not participating.

APPENDIX B

ORDER IN CONTEMPT OF THE COUNTY CRIMINAL COURT NO. 10 OF DALLAS COUNTY, TEXAS

IN RE:
RANDY GROTHE

No. _____
In the County Criminal Court
No. 10 of Dallas County, Texas
Entered: April 12 A.D., 1984

ORDER IN CONTEMPT

On this day came on to be heard the trial on the merits as heretofore scheduled in the case of the State of Texas vs. Mavis Belisle, No. MA83-79866-L, on the docket of the Court, and came Randy Grothe, hereinafter styled the defendant-in-contempt, who is a witness for the defense in the foregoing cause; and during said proceeding the said defendant-in-contempt, in open court, in the presence of the Court, was in direct contempt of the Court in the following particulars, to-wit: said defendant-in-contempt, Randy Grothe, did refuse after so being ordered by the Court to secure and bring to court the photographic pictures he took on September 23, 1983, at the Dallas Power and Light building in Dallas, Texas, of the disturbance occurring at said location between the hours of 6:30 a.m. and 8:30 a.m., which said conduct tended to bring the authority and administration of the law into disrepute and disregard; and to impede, embarrass, and obstruct this Court in the discharge of its duties.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED, that the said defendant-in-contempt is in direct contempt of the Court and that he be punished therefore by imprisonment in the County Jail for so long as he refused to provide the material ordered by the Court, to-wit: photographic pictures he took on September 23, 1983, at the Dallas Power and Light building in Dallas, Texas, of the disturbance occurring at said location between the hours of 6:30 a.m. and 8:30 a.m., and that he be remanded into the custody of the Sheriff under appropriate writ of commitment to be confined until he so

purges himself of this contempt, unless sooner released by order of this Court or other Court of appropriate jurisdiction.

/s/

JUDGE PRESIDING
County Criminal Court No. 10
Dallas County, Texas

APPENDIX C

ORDER DENYING MOTION FOR REHEARING

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

RE: Case No. 69,275

STYLE: Grothe, Ex Parte Randy Eli

April 24, 1985

On this day the Appellant's Motion for Rehearing was denied.

COUNTY CRIMINAL COURT NO. 10
MA84-03291 Thomas Lowe, Clerk

APPENDIX D

OPINION CONCURRING IN DENIAL OF MOTION FOR REHEARING

EX PARTE
RANDY ELI GROTHE,
Applicant
NO. 69,275

v.

THE STATE OF TEXAS
Appellee,

Habeas Corpus Application from DALLAS County

OPINION CONCURRING IN DENIAL OF LEAVE TO FILE APPELLANT'S MOTION FOR REHEARING

Applicant complains the Court on original submission misread *Branzburg v. Hayes,* 401 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) [hereafter *Branzburg*] in refusing to recognize the constitutional necessity for a balancing of First and Sixth Amendment interests in cases such as this; he argues that this refusal, in turn, results in adoption of an "absolutist position" which denies the existence of *any* First Amendment privilege of journalists to decline to reveal unpublished material.

I agree that our opinion on original submission may have been hasty in concluding that the *Branzburg* plurality "quite clearly found that no balancing was required;" however, the balancing test advocated by applicant today is virtually identical to that advanced by Judge Stewart in dissent in *Branzburg*, a position which *was* quite clearly rejected by five members of the Supreme Court.

As I read *Branzburg*, the "balancing" endorsed by the plurality and Justice Powell is more in the nature of weighing considerations relevant to a motion to quash a subpoena within the context of First vis-a-vis Sixth

Amendment concerns: whether a grand jury investigation is instituted or conducted in good faith; whether subpoenas are issued, not for legitimate purposes of law enforcement, but to instead harass the press or disrupt a reporter's relationship with news sources; consideration of the propriety, purposes, scope of the judicial proceeding and the pertinence of the evidence sought; etc.

But applicant would read *Branzburg* to require this criminally accused, before seeking to exercise a Sixth Amendment right to compulsory process in order to prepare a defense to the accusation, to show (1) she has "exhausted alternative sources" for what is revealed in applicant's subpoenaed photographs; (2) she has "a compelling need for" them; and, (3) that the photos are "highly relevant to the defense."

I simply do not read into *Branzburg* any such test, much less any allotment of that burden on a party to a criminal prosecution. On the contrary, the concurring opinion observed that such a rule would,

> "as a practical matter, defeat ... a fair balancing and the essential societal interest in the detection and prosecution of crime would be heavily subordinated."

408 U.S. at 710.

Moreover, in *Branzburg*, the Court's majority specifically refused to accord any privilege whatever to journalists to choose not to even *appear* when summoned by lawful subpoena.[1] Further, a majority of the Court was not persuaded that the litigants claiming a right to pro-

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[1] As I understand the dissenting positions in *Branzburg*, the "balancing" criteria advocated by our applicant here would place the three burdens discussed *ante* on the State or accused before the journalist in question would be required to even *appear* pursuant to a subpoena.

tect confidential sources had demonstrated any intolerable burden on news gathering or other clear First Amendment rights.[2] And the plurality discussed at some length the well recognized limitations on the press demonstrating that the First Amendment is not absolute in its operation.[3]

While many of the issues advanced in applicant's motion for rehearing are provocative, important and deserving of serious consideration by this Court in a proper context, I do not perceive that they are presented by the facts of the instant case. As I understand those facts, the applicant was assigned by *The Dallas Morning News* to photograph a protest demonstration outside the Dallas Power and Light offices in downtown Dallas. Applicant took photographs of the demonstration as well as the arrest and removal of certain demonstrators, including Mavis Belisle. Belisle was subsequently charged with a penal offense, obstructing a public passageway, and sought applicant's testimony, and later, his photographs, for her trial. Applicant's refusal to make his photos avail-

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[2] The Court observed that the facts of the cases did not implicate recognized First Amendment concerns such as intrusions upon speech or assembly, prior restraint or restriction on publication; express or implied command that the press publish what it prefers to withhold; exaction or tax for publishing privilege; penalty, civil or criminal, related to the content of published material; restriction on use of confidential sources; any requirement that the press publish its sources of information or indiscriminately disclose them on request.

[3] The plurality mentioned, for example, that the press may not circulate knowing or reckless falsehoods damaging to private reputation; the First Amendment does not guarantee the press a constitutional right of special access to information not available to the general public; the press is regularly excluded from grand jury proceedings, court conferences, meetings of official bodies and private organizations; newsmen have no constitutional right to access to the scenes of crime or disaster when the public is excluded and may be prohibited from attending or publishing information about criminal trials in order to assure the fairness of the proceeding.

able to Belisle for purposes of cross-examination forms the basis of this contempt proceeding.

In declining to recognize a newsman's unqualified right to refuse to reveal confidential sources under the three fact situations presented in *Branzburg*, the plurality stated:

> "On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but *uncertain*, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."

408 U.S. at 690-691.

From this record one cannot perceive any certain burden on news gathering that might result from requiring the applicant here to turn over photographs which may exonerate a person criminally accused, and which applicant took in a public place apparently accessible to the public at large. Neither do I read applicant's motion for rehearing to argue that his evidence established any such realistic burden.

If the Court's opinion on original submission is limited, as it clearly states it is, to the "narrow question" presented by the facts, damage to the First Amendment cannot be seriously read into it. It is therefore appropriate to reiterate here the concluding paragraph of Justice Powell's concurring opinion in *Branzburg*:

> "In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."

408 U.S. at 710

Such legitimate interests are simply not presented today.

Therefore I concur in the Court's denial of leave to file.

CLINTON, Judge

(Delivered April 24, 1985)

EN BANC

PUBLISH

APPENDIX E

CONSTITUTIONAL PROVISIONS INVOLVED

APPENDIX E

U.S. CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

TEXAS CONSTITUTION, ARTICLE I, SECTION 8

Freedom of speech and press; libel

Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

APPENDIX F

PORTIONS OF THE RECORD IN WHICH FEDERAL QUESTIONS WERE RAISED

F-1

No. 83-79866-L

THE STATE OF TEXAS V. MAVIS BELISLE	**In The County Criminal Court No. 10 Dallas County, Texas**

MOTION AND BRIEF OF SUSAN ROGERS AND RANDY GROTHE TO QUASH SUBPOENAS

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Susan Rogers, a news reporter for *The Dallas Morning News,* and Randy Grothe, a news photographer for *The Dallas Morning News*, and respectfully move the Court to quash the subpoenas served upon them by defendant and state:

1. The demand for testimony and for unpublished source materials and unpublished photographs obtained by them with respect to the subject matter of this case is improper and seeks privileged information that is protected by the First Amendment to the United States Constitution, by federal common law, and by Art. I, Sec. 8 of the Texas Constitution, and interferes with the news-gathering and editorial process.

2. There is no demonstration by defendant that there is any compelling need for these source materials and photographs or for the testimony of Rogers or Grothe, or that other sources for the same information have been sought or exhausted. *Branzburg v. Hayes*, 408 U.S. 665 (1972); *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Loadholtz v. Fields*, 389 F.Supp. 1299 (M.D. Fla. 1975); *Gulliver's Periodicals, Ltd. v. Charles Levy Circulating Co.*, 455 F.Supp. 1197 (N.D. Ill. 1978); *Mize v. McGraw-Hill, Inc.*, 82 F.R.D. 475

(S.D. Tex. 1979), *on rehearing*, 86 F.R.D. 1 (S.D. Tex. 1980); *Lamberto v. Bown*, 326 N.W.2d 305 (Iowa 1982); *Suede Originals v. Aetna Casualty*, 8 Media L. Rep. 2565, No. 82-0532-L (Dist. Ct. of Dallas County, 193rd Judicial Dist. of Texas, Nov. 19, 1982) (copy attached).

3. It is wrong and improper for any party to this litigation to attempt to appropriate media employees as investigative tools. "To make the press, in effect, the investigative arm of every civil [and criminal] litigant throughout the State of Texas inevitably will constrict the flow of information to the press, and ultimately to us all." *Suede Originals*, 8 Media L. Rep. at 2566.

Accordingly, it is respectfully requested that defendant's subpoenas be quashed.

Respectfully submitted,

/s/

JOHN H. MCELHANEY
State Bar No. 13581000
THOMAS S. LEATHERBURY
State Bar No. 12095275
LOCKE, PURNELL, BOREN,
LANEY & NEELY
(A Professional Corporation)
3600 RepublicBank Tower
Dallas, Texas 75201-3989
(214) 754-7400

Attorneys for Susan Rogers and Randy Grothe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been hand delivered to counsel of record on this 11th day of April, 1984.

/s/

John H. McElhaney

SUEDE ORIGINALS

V.

AETNA CASUALTY

Texas District Court
193rd Judicial District
Dallas County

SUEDE ORIGINALS v. AETNA CASUALTY, No. 82-0532-L, November 19, 1982

NEWSGATHERING

Forced disclosure of information - Disclosure of unpublished information (§60.10)

Insurance company's failure, in seeking nonparty newspaper's disclosure in civil action of newspaper's published and unpublished photographs of fire, to show that it has exhausted all alternative sources for such information requires trial court's grant of newspaper's motion to quash.

Newspaper files motion to quash subpoenas requiring its production of published and unpublished photographs of fire.

Motion to quash granted.

Charles L. Babcock, of Jackson, Walker, Winstead, Cantwell & Miller, Dallas, Tex., for petitioners.

Full Text of Order

Snodgrass, J.:

The Court has been presented with the Motion to Quash Subpoenas served on Mike Smith, Ray Adler and The Times Herald Printing Company, Inc. (hereinafter Petitioners) by the Defendant, Aetna Casualty. The Court

has conducted an evidentiary hearing on said Motion and for reasons hereinafter enumerated finds that the Motion to Quash should be in all things SUSTAINED.

Smith is a news photographer for The Times Herald Printing Company which publishes the *Dallas Times Herald*. Adler is the Director of Photography for the Times Herald. On or about September 11, 1981, Smith was assigned to photograph a fire in downtown Dallas. Both Smith and Adler were served with subpoenas duces tecum requiring them to bring to a deposition published and unpublished photographs of the above referenced fire.

The Times Herald and its employees claim a privilege under the First Amendment to the United States Constitution and Article 1, Section 8 of the Texas Constitution which, they argue, requires the subpoenas to be quashed.

The Petitioners do not contend that the unpublished photographs are derived from or relate to a confidential source. They do state, however, that publication or nonpublication of such resource materials involves editorial decisions and the exercise of editorial discretion. *See, Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 [1 Med.L.Rptr. 1898] (1974). They further state that requiring Smith and Adler to testify will necessarily have a "chilling effect" upon the gathering and publication of news and upon the flow of information to the public, in violation of the First Amendment to the U.S. Constitution and Article I, Section 8 of the Texas Constitution. *See, Houston Chronicle Pub. Co. v. Shaver*, 630 S.W.2d 927 [8 Med.L.Rptr. 1314] (Tex. Crim. App. — 1982); *Dallas Oil & Gas, Inc. v. Mouer*, 533 S.W.2d 70 (Tex. Civ. App. — Dallas, 1976, no writ hist.); *Foster v. Ford Motor Co.*, Civil Action 3-76-1087-G (March 1977) (Judge Higginbotham granting a motion to quash subpoena on Times Herald for photographs of automobile accident). *See also, Democratic*

National Committee v. McCord, 356 F.Supp. 1394 (D.D.C., 1973); *Loadholtz v. Fields*, 389 F.Supp. 1299 (M.D. Fla., 1975); *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976).

When a member of the press is subpoenaed in a case where the press is not a party, there is a qualified privilege which shifts the burden to the party seeking the information to establish all elements of a three-part test; that is, (a) the reporter has information highly relevant to a claim or defense in the underlying litigation; (b) there is a compelling need for disclosure sufficient to override the reporter's First Amendment privilege; and (c) the party seeking the information has unsuccessfully attempted to obtain it from other sources less chilling of First Amendment freedoms. *See, Florida v. Morel*, 4 Med.L.Rptr. 2309 (Fla. Cir. Ct. — Broward, 1979).

The Defendant suggests that it needs to see the photographs first before it can make a showing sufficient to overcome prong (a) of the test. That procedure is, however, not contemplated by the privilege. If that were an exception to the highly relevant standard, it would surely swallow up the rule because the press would constantly be called upon to disgorge the very information they have a privilege to protect.

The Defendant argues that the alternate source requirement is met because there are no other pictures like those in the possession of the Petitioners. The Court finds, however, that several hundred pictures were taken by fire investigators and other state officials and have been fully accessible to the Defendant during the course of discovery in this case. In addition, it was represented by Petitioner's counsel and undisputed by Defendant that a Dallas television station had provided film footage of the fire from its news broadcasts. The alternate source requirement has not been met in this case.

The job of a newspaper is to gather as much information as it possibly can with respect to all facets of activity of interest and importance to readers. If it does its job well, it logically will be the repository of much information concerning controversial events which take place in the area which it serves. If the price of doing its job well, however, is to be a repeated role as the resource for those seeking information of only speculative value to themselves, coupled with a governmental command that they play that role, the effect will be severe.

To make the press, in effect, the investigative arm of every civil litigant throughout the State of Texas inevitably will constrict the flow of information to the press, and ultimately to us all. *Branzburg v. Hayes*, 408 U.S. 665, 709-10 [1 Med.L.Rptr. 2617] (1972) (Powell, J., concurring).

The Motion to Quash is in all things sustained.

IT IS SO ORDERED.

OTHER PORTIONS OF THE RECORD IN WHICH THE FEDERAL QUESTIONS WERE RAISED

Statement of Facts — Vol. I at 10

THE COURT: It's your motion.

MR. McELHANEY (Counsel for Grothe): The burden is on the party who attempts to subpoena people to demonstrate the elements of the test that the federal cases and the U.S. Supreme Court have delineated under the First Amendment and those are that there is a compelling need that alternative sources have been exhausted and that there are no other alternate means of proving what they are attempting to prove. On the face of the attempt here, none of those tests have been met.

Statement of Facts — Vol. II at 92

MR. McELHANEY: So the Court will procedurally know where we are going, Mr. Grothe will be here and will respond fully to the questions regarding what he observed as a citizen. However, I will be instructing him and making objections on the First Amendment grounds to anything that goes to the news gathering process or touches upon his role as a news reporter.

Statement of Facts — Vol. II at 95

MR. McELHANEY: For the record, we renew our objection based on the First Amendment of the United States Constitution as well as Article I, Section 8 of the Texas Constitution that the forced testimony of this witness interferes with the news gathering process. We understand what the Court's ruling is. We just wanted to insert that at this point for the record.

Statement of Facts — Vol. II at 99

Q. (MR. REED, counsel for Belisle): Can you give us an idea from your memory — do you have any idea how many frames you exposed —

MR. McELHANEY: Your honor, at this point we will object on the grounds that the interrogation is going beyond the scope of what was represented to the Court as well as what the subpoena apparently called for and is an intrusion of the news gathering process. There is a photograph that appeared in the Dallas Morning News that is part of the public domain. Anything else is unpublished material and an interrogation about it interferes with the news gathering and editorial decision process of what to print and what not to print. And we again object on the grounds that it's interference and also based upon the First Amendment of the United States Constitution and Article 1, Section 8 of the Texas Constitution.

THE COURT: Overruled.

Statement of Facts — Vol. II at 107

Q. (MR. REED, counsel for Belisle): And is it safe to say that your pictures would indicate the condition of who was chained to the door or not?

MR. McELHANEY: Your Honor, we object to the question asked framed includes any pictures not reported or printed in the paper. We object on the First Amendment and privilege grounds that were stated.

THE COURT: Overruled on the question as asked.

Statement of Facts — Vol. II at 109-10

Q. (MR. REED, counsel for Belisle): At this time, we would move that the pictures be used by the witness and

the witness be allowed to use the pictures to refresh his recollection and testify further after the recollection has been refreshed as to whether or not he could testify as to the condition of the people in front of that door, your Honor.

MR. McELHANEY: We renew our objection. This clearly now calls for unpublished materials. More importantly it does seriously interfere with the news gathering and editorial process to have unpublished materials subject to being subpoenaed. We object.

Statement of Facts — Vol. II at 131-32

THE COURT: Mr. Grothe, was the time given to you by the Court sufficient enough that you could go and secure the pictures?

MR. GROTHE: Yes, sir.

THE COURT: Have you done so?

MR. GROTHE: No, sir. With all due respect to the bench I believe I will take the First Amendment here.

THE COURT: I never heard it put quite that way before. But, Mr. Grothe, it's my obligation, I feel, even if not required by the law but out of fairness to warn you that if you do not comply with the order of the Court, the Court will consider that a direct contempt and as such would be required to imprison you until such time as you did comply with the Court's order. Are you aware of that?

MR. GROTHE: Yes, sir.

THE COURT: And being aware of the possible consequences of your actions, state for the record whether or not you still insist on not producing the photographs, specifically those taken by you at the Dallas Power and Light building in Dallas, Texas of the disturbance occur-

ring at said location between the hours of six-thirty a.m. and eight-thirty a.m. on September 23, 1983?

MR. GROTHE: Yes, sir. For the record I cannot produce these negatives because of the First Amendment.

THE COURT: The Court finds that there is no First Amendment privilege that would be applicable to the particular situation at hand in this case ....

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

EX PARTE:
RANDY ELI GROTHE
APPLICANT

No. _____

ORIGINAL APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

NOW COMES RANDY ELI GROTHE, who is being illegally confined and restrained of his liberty at the Dallas County Jail in the City of Dallas, County of Dallas, State of Texas by Don Byrd, Sheriff of Dallas County, Texas and the Honorable Robert G. Moss, Judge of County Criminal Court Number Ten of Dallas County, Texas. Applicant is currently released from actual custody by virtue of the posting of a $1,000.00 surety bond with the Sheriff of Dallas County. Applicant would request that said bond be continued during the pendency of this proceeding.

Said confinement and restraint is by virtue of a certain order of contempt, a copy of which is attached hereto as Exhibit A. Contemporaneously with the filing of this application, Applicant is filing a certified copy of the County Court's entire file in this case.

Said confinement and restraint is illegal in that the order of contempt does not comply with the law concerning contempt, and the order of contempt is in violation of the freedom of speech and press, as guaranteed by Article 1, §8 of the Texas Constitution and the First Amendment to the United States Constitution (through the operation of the Fourteenth Amendment).

WHEREFORE, Applicant, Randy Eli Grothe, prays for the Court to grant and issue a writ of habeas corpus to have Applicant forthwith brought before the Court so that Applicant may be discharged from such illegal confinement and restraint.

Respectfully submitted,

/s/

JOHN H. MCELHANEY
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THOMAS S. LEATHERBURY
State Bar No. 12095275
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OF COUNSEL:

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RONALD L. GORANSON
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Suite 900
714 Jackson Street
Dallas, Texas 75202
(214) 651-1121

STATE OF TEXAS
COUNTY OF DALLAS

I do solemnly swear that I am the applicant named in the foregoing application, that I know the contents thereof, and that the allegations of said application are true according to my belief.

/s/
RANDY ELI GROTHE

SUBSCRIBED AND SWORN TO before me on this the 13 day of April, 1984.

/s/
Notary Public in and for the
State of Texas

My commission expires:
1-31-85

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing application has been mailed, certified mail, return receipt requested, to the following individuals on this 13th day of April, 1984:

HON. ROBERT G. MOSS, JUDGE
County Criminal Court No. 10 of
Dallas County, Texas
Dallas County Courthouse
600 Commerce Street
Dallas, Texas 75202

DON BYRD, SHERIFF
Dallas County Courthouse
600 Commerce Street
Dallas, Texas 75202

MR. HENRY WADE, DISTRICT ATTORNEY
Attn: Rick Jordan,
Assistant District Attorney
Dallas County Courthouse
600 Commerce Street
Dallas, Texas 75202

MR. ROARK REED
Attorney-at-Law
Southern Methodist University
School of Law
3315 Daniel
Dallas, Texas 75275

/s/
JOHN MCELHANEY

PORTIONS OF GROTHE'S MOTION FOR REHEARING IN THE TEXAS COURT OF CRIMINAL APPEALS

IV.

POINTS OF ERROR

1. The Court erred in holding that journalists have no qualified privilege under the First Amendment to the United States Constitution, Article I, section 8 of the Texas Constitution, or the Texas common law to decline to produce previously unpublished material in the absence of any showing that such material is highly relevant, that the subpoenaing party has a compelling or critical need for such material, and that the subpoenaing party has exhausted all reasonable alternative sources for such material.

2. The Court erred in holding that applicant's rights would not be diminished in any way by requiring production of photographs of an alleged criminal offense occurring in a public place.

APPENDIX G

ORDER STAYING COMMITMENT

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE:
RANDY ELI GROTHE
Applicant

No.

ORDER

The commitment issued in Cause No. 83-79866-L is ordered stayed and applicant Randy Eli Grothe is continued on the present bond until further orders from this Court.

It is so ordered this 13th day of April, 1984.

Per Curiam

APPENDIX H

ORDER REQUESTING ADDITIONAL BRIEFS

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

EX PARTE RANDY ELI GROTHE	**Habeas Corpus Application from Dallas County**

ORDER

On this day came to be considered this original application for writ of habeas corpus in which the applicant complains that he is being illegally restrained of his liberty by virtue of an order of contempt entered by the respondent, the Honorable Robert G. Moss, Judge of Dallas County Criminal Court No. 10, in cause number 83-79866-L, styled the State of Texas v. Mavis Belisle.

Prior to determining whether leave to file this application will be granted, the Respondent Judge shall file a response in this Court on or before April 27, 1984, and shall cause to be prepared and forwarded to this Court on or before such date the record of proceedings in the trial court.

The applicant is granted leave to file a supplemental brief in this cause on or before April 27, 1984, and briefs from the District Attorney and defendant Marvis Belisle by that date are invited.

Pending further order of this Court, the applicant shall remain free on the bond previously granted by the trial court.

It is so ordered this 16th day of April, 1984.

Per Curiam

En Banc

APPENDIX I

ORDER GRANTING LEAVE TO FILE APPLICATION FOR WRIT OF HABEAS CORPUS

NO. 69,275
IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

EX PARTE RANDY ELI GROTHE	**Habeas Corpus Application from Dallas County**

ORDER

The motion for leave to file this original application for writ of habeas corpus, arising out of cause number 83-79866-2, styled the State of Texas v. Mavis Belisle, is granted and the case is ordered to be submitted to the En Banc Court on May 30, 1984, without oral argument.

It is so ordered this 27th day of April, 1984.

Per Curiam

En Banc